Date: August 28, 1997

Case No.: 97-INA-55

In the Matter of:

ALBERTO'S MEXICAN RESTAURANT,
Employer

On Behalf Of:

MARIA E. CAMPOS-HUITRON,
Alien

Appearance: Susan M. Jeannette, Immigration Processor
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On May 15, 1995, Alberto's Mexican Restaurant ("Employer") filed an application for labor certification to enable Maria Esperanza Campos-Huitron ("Alien") to fill the position of Cook (AF 145-146). The job duties for the position are:

> Cook for authentic Mexican Restaurant. Must be able to use standard restaurant equipment and utensils. Able to prepare a wide range of Mexican foods. This schedule allows for a thirty minute meal break. Responsible for ordering inventory. Must speak Spanish as the crew and the owners only speak Spanish and a good percentage of the patrons are native language Spanish speakers as this restaurant is located in a Hispanic neighborhood and this restaurant is authentic.

The requirements for the position are eight years of grade school, four years of high school, and two years of experience in the job offered or in a related occupation in a restaurant. Other Special Requirements are, "[m]ust have Dept. of Health County of San Diego required Foodhandler's card." The application also lists that the Alien will supervise two employees.[2]

The CO issued a Notice of Findings on April 4, 1996 (AF 136-143), proposing to deny certification on the grounds that the Employer has failed to document its actual minimum requirements in violation of 20 C.F.R. § 656.21(b)(5). The CO stated that the Employer's requirement of two years of experience in the job offered does not appear to meet the Employer's true minimum requirements as it appears that all of the Alien's experience has been gained through employment with the petitioning employer. Additionally, none of the Alien's claimed experience can be verified. The CO further stated that,

> The instant application is one of several for which the petitioning employer submits a payroll record from what is elsewhere stated to be a corporate headquarters; it is impossible to verify from this information which specific Alberto's Mexican Restaurant any worker who is listed on that payroll actually works for.

Next, the CO found that unlawful terms and conditions of employment may exist here in violation of 20 C.F.R. § 656.20(c)(7), as the Alien submitted a statement that she worked from June 1991 until April 1993, 40 hours per week, for Alberto's Mexican Restaurant in National

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

[2] The Employer deleted the supervisory requirement by letter dated August 2, 1995 (AF 147).

City, California; however, she was not listed as an employee on the payroll records and, therefore, did not receive wages. Next, the CO questioned whether there is a current job opening to which U.S. workers can be referred, or whether there is a current existing business operated by the Employer as provided in 20 C.F.R. § 656.3. Additionally, the CO cited 20 C.F.R. § 656.20(c)(4), which indicates that the Employer must be able to place the Alien on the payroll on or before the date of the Alien's proposed entrance into the U.S. Accordingly, the CO stated that there is a question as to whether the Employer can afford to pay the prevailing wage for this Alien and the other alien beneficiaries of the other applications as well.

Lastly, the CO found no clear opening for U.S. workers, in violation of 20 C.F.R. § 656.20(c)(8). The CO stated that since it appears that the Alien has been "volunteering" for the Employer, there is some question as to whether the Employer would replace the Alien with a worker who requires the prevailing wage. The CO also questioned whether the Alien is a relative of an owner of the Employer, Filiberto's, another Alberto's, or the parent corporation; if so, it would appear that the Alien would "ultimately exercise a determining influence in assessing the qualifications of any U.S. worker who might apply."

Accordingly, the Employer was notified that it had until May 9, 1996, to rebut the findings or to cure the defects noted.

In its rebuttal, dated April 20, 1996 (AF 100-135), the Employer contended that Filiberto's and Alberto's are owned and operated by two completely different, unrelated families. The Employer also stated that the Alien's wages cannot be verified because Filiberto's paid her in cash because she could not be placed on the payroll without a Social Security Number. The Employer further stated that she had owned and operated seven Alberto's restaurants and she also "signed on for some cases in San Bernardino when the owner suddenly died during the same time a Notice of Findings was issued." The Employer contended that it takes "at least two years of cooking Mexican foods to become proficient as a Mexican specialty cook."

The Employer provided a list of the individual Alberto's Mexican Restaurants, and stated that Alberto's just became a franchise in the early months of 1996. The Employer also attached a letter from her Attorney relating the Alberto's Molca Salsa franchise, which is the new name of the company. Also attached to the rebuttal are menus for Alberto's and Filiberto's.

The Employer next contended that the Alien has not worked for her since August 1995, when it was discovered that her Social Security Number was not valid. Additionally, the Employer stated that the Alien will not be permitted to come back to work for her until she does have a valid Social Security Number.

Next, the Employer stated that U.S. workers "do not want to work for **Alberto's**. They want to work for places like **El Toritos** or **Chevy's**. We are a simple operation. We are open 24 hours per day. Not all available shifts are that attractive to American workers, since they want to work days and have their weekends off." (Emphasis supplied in original.) The Employer then claimed that her restaurant managers usually hire the workers. Additionally, the Employer stated that the Alien is not related to her, or to any other owners of Alberto's Mexican Restaurants, in any manner, nor does she have any interest, shares of stock, control, or influence over the

Employer's business. The Employer further stated that the Alien has no authority to hire or fire employees.

The Employer stated that she is the President and Treasurer of Molcarla, Inc., and her brother, Francisco Rodriguez, is the Vice-President and Secretary. She also stated that the parent corporation of Alberto's, Molca Salsa, was incorporated about the same time as Molcarla, Inc., and her brother, Francisco Rodriguez, is the President and Treasurer and she is the Vice-President and Secretary of this corporation.

The CO issued the Final Determination on August 1, 1996 (AF 96-99), denying certification because the Employer remains in violation of 20 C.F.R. §§ 656.21(b)(5), 656.3, and 656.20(c)(4). The CO stated that the Employer has failed to document that she has a *bona fide*, full-time job opportunity for a restaurant cook.

On August 17, 1997, the Employer requested reconsideration and/or review of the Denial of Labor Certification (AF 2-95). The CO denied reconsideration on August 30, 1996 (AF 1), and in November 1996, forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). On December 20, 1996, the Employer submitted a Brief. On March 14, 1997, BALCA issued an Order allowing the Employer 30 days to submit a statement as to whether it still wishes to pursue this appeal and, if so, to submit a current address for the Alien.

Discussion

Section 656.21(b)(5) requires an employer to document either: (1) that the requirements it specifies for a job opportunity are its actual minimum requirements and the employer has not hired workers with less training or experience for jobs similar to the one offered; or, (2) that it is not feasible to hire workers with less training or experience than that required by the job offer. Thus, an employer violates § 656.21(b)(5) if it hired the alien with lower qualifications than it is now requiring and has not documented that it is now not feasible to hire a U.S. worker without that training or experience. *Capriccio's Restaurant,* 90-INA-480 (Jan. 7, 1992); *Office-Plus, Inc.,* 90-INA-184 (Dec. 19, 1991); *Gerson Industries,* 90-INA-190 (Dec. 19, 1991). The purpose of this section is to prevent employers from requiring more stringent qualifications of a U.S. worker than it requires of the alien. The employer may not treat the alien more favorably than it would a U.S. worker. *ERF Inc., d/b/a Bayside Motor Inn,* 89-INA-105 (Feb. 14, 1990).

In this case, the CO, in accordance with § 656.21(b)(5), instructed the Employer to document that its requirement for two years of experience for the job opportunity represents the Employer's actual minimum requirements for the job opportunity (AF 137-140). Specifically, the CO questioned whether the Alien gained the requisite two years of experience while employed by a different employer. Accordingly, the CO instructed the Employer to delete the experience requirement or to provide evidence that the Alien gained two years of experience with a different employer or to provide evidence that it is not now feasible to hire an individual with less than two years of experience.

In order to prove that the alien gained his qualifying experience with a different employer, the employer must demonstrate that its ownership and control are separate and distinct from the

company where the alien gained his qualifying experience. *Salad Bowl Restaurant t/a Ayhan Brothers Food, Inc.*, 90-INA-200 (May 23, 1991). Even if the companies are not owned or controlled by the same individuals, the employer may have to show a "distinct operational independence" between the two entities. *Obro Ltd.*, 90-INA-51 (Feb. 21, 1991) (employer may not play "musical employees" to bypass labor certification requirements). In this case, we find that the Employer has not demonstrated that the Alien acquired her alleged experience while working for a separate entity.

In rebuttal, the Employer asserted that:

> The alien has two years previous experience from Filberto's as required by the ETA 750A, the job posting and the newspaper advertisement, from, I am very sorry that they paid this worker in cash and did not put him/her on the payroll.

(AF 102). The Employer explained that Alberto's and Filiberto's are not connected or related in any manner. However, we note that the Alien stated that she gained experience while working at Alberto's in National City, California, not Filiberto's (AF 194). Moreover, the record contains a signed statement from Aurelio Zaragoza asserting that the Alien worked for him at Alberto's from June 1991 through April 1993 (AF 191). Notwithstanding these confusing inconsistencies, the Employer has not submitted any documentation regarding the Alien's previous experience. For instance, the Employer has not submitted any proof that Mr. Zaragoza owned the Alberto's in National City at the time that the Alien allegedly gained her experience. Although a written assertion constitutes documentation that must be considered under *Gencorp*, 87-INA-659 (Jan. 12, 1983) (*en banc*), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. See also *Il Nido Ristorante*, 90-INA-199 (May 23, 1991) (bare assertions and scanty documentation not enough to establish that the employers are different, especially where the CO requests specific documentary evidence).

Therefore, we find that the Employer has not submitted sufficient proof that the restaurant where the Alien allegedly gained her experience was a separate and distinct entity at that time.[3] Accordingly, we find that the Employer is in violation of § 756.21(b)(5) and the CO's denial of labor certification is hereby AFFIRMED.[4]

Accordingly, we find that the Employer has not sufficiently documented that the Alien possesses the requisite experience or, assuming the Alien has two years of experience, that it was

[3] Moreover, in view of the findings made herein, we do not decide whether experience gained while an alien does not have legal status to work in this Country can be used as proof of requisite experience.

[4] We note that separate applications for labor certification have no precedential value and, therefore, are not relevant to this discussion. See *Tedmar's Oak Factory*, 89-INA-62 (Feb. 26, 1990).

acquired while working for an entity separate from the Employer. As such, the CO's denial of labor certification is hereby AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.